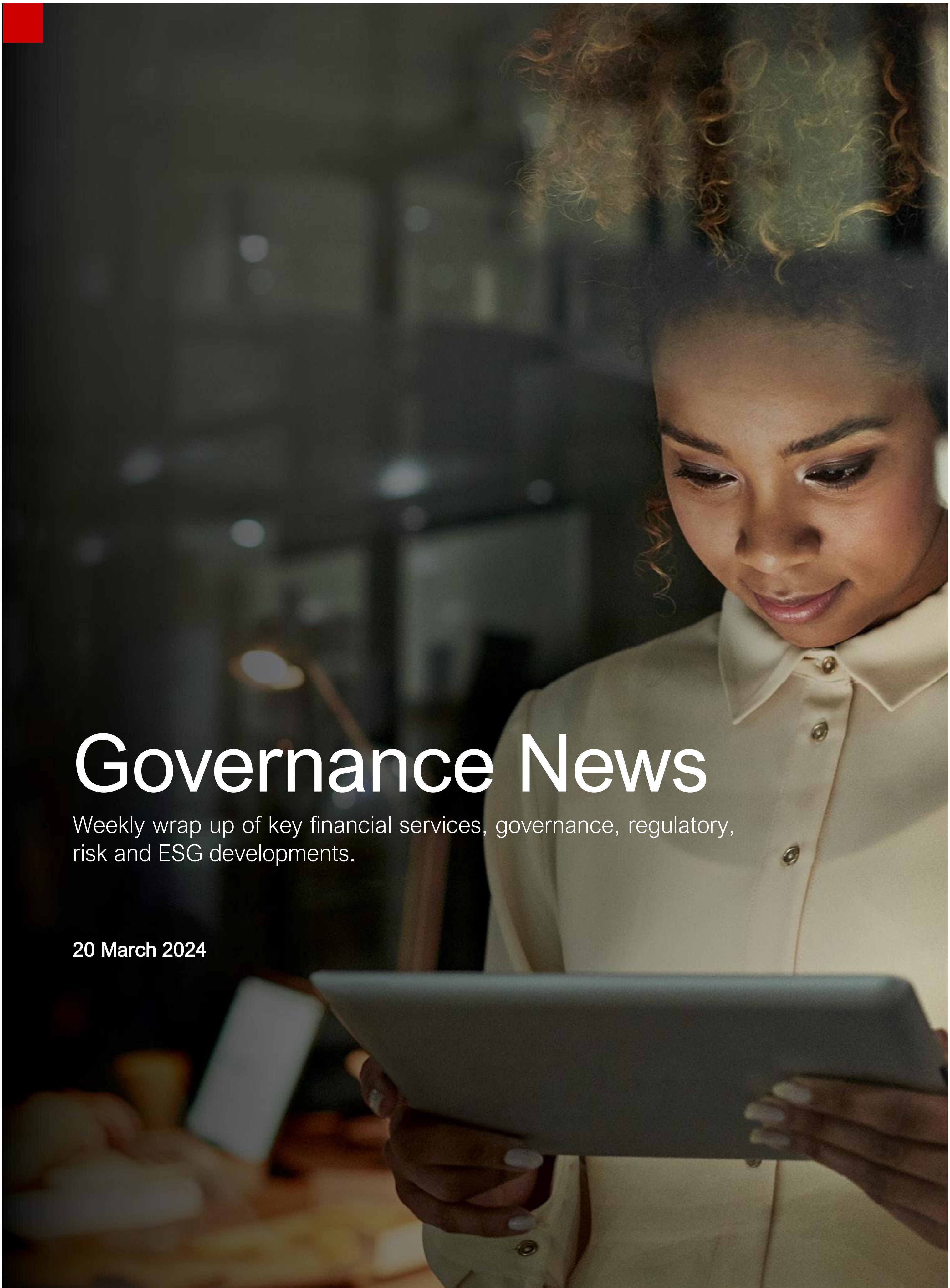


Governance News

Weekly wrap up of key financial services, governance, regulatory, risk and ESG developments.

20 March 2024

Contents

Boards and Directors

Landmark legal opinion concludes that UK Directors have an existing duty to consider nature risk

A new independent legal opinion - Shivji KC & Stubbs KC Opinion - (commissioned by Pollination Law and the Commonwealth Climate and Law Initiative (CCLI)) opines that directors have an existing duty to consider nature under s172 and 174 of the Companies Act 2006 UK.

Very briefly, the authors opine that:

> [239.1.] 'Nature-related risks are relevant to directors' duties under ss. 172 and 174 CA 2006. A director who properly identifies and manages a company's nature-related risks will generally be promoting the success of the company. A director who becomes familiar with the nature-related risks which the company is facing and takes steps to identify, assess and (if necessary) disclose those risks in accordance with recognised industry standards and best practice will likely be acting with reasonable care, skill and diligence'.

The authors further submit [at para 129] that directors may (in some circumstances) have a **positive duty** not only to consider nature, but to 'act to mitigate these [ie nature-related] risks in order to comply with these duties [ie duties under ss 172 and 174].

The authors opine (at paras [162] –[163]) that failure to consider (and potentially act to mitigate) nature-related risks may also **expose directors to liability** under ss 172 and 174 (as well as to other consequences eg challenge to any remuneration or exit package).

What should directors do?

The opinion offers – at paras [239.3.1]-[239.3.5] - the following suggestions around the steps directors could consider taking to help ensure they are able to demonstrate that they have discharged the duties under ss. 172 and 174.

> **'identification** and active consideration of the extent to which a company faces nature-related risks. A director who fails to take this first step will find it harder to justify action or inaction than a director who properly identifies and considers nature-related risks but elects to take no further action'.
>
> **'Assessment/evaluation**: Having identified the extent to which the company faces nature-related risks, a director might then assess and evaluate those risks and the potential they have to cause harm to the company. Toolkits such as the TNFD Recommendations and the Financial and Impact materiality approaches may be of assistance in this respect, and it may also be appropriate to consider whether expert advice is required'.
>
> **'Risk management/mitigation**: Once the extent to which nature-related risks pose potential harm to the company is known, a director ought then to consider how best to manage and/or mitigate those risks, and may wish to design and implement a framework for systematically managing those risks'.
>
> **'Disclosure:** In addition to assessing and managing nature-related risks, a director should consider the extent to which those risks should be disclosed. This will at a minimum involve compliance with the legislative and regulatory rules which govern such disclosure. In addition, a director may feel that compliance with the duties under ss. 172 and 174 can be better achieved by giving voluntary disclosure of nature-related risks which go beyond what is required by law. That might be the case, for example, where there is an emerging market standard or investor expectation for giving such additional disclosure'.
>
> **'Documentation:** Whichever steps a director decides to take in identifying, assessing and (where appropriate) mitigating nature-related risks, such steps should always be properly documented in (for example) board minutes, agendas, memorandums and/or reports'.

Australia

The opinion is the latest in a series of opinions on this/related issues. An expert opinion (also commissioned by CCLI and Pollination) opines that Australian directors also have a duty under existing law to consider nature-related risk. Read: Nature related risk | Landmark legal opinion cautions directors may be liable for nature-related risk under existing Australian law - POST - MinterEllison

> [Sources: Pollination media release; Full text opinion: Shivji KC & Stubbs KC Opinion]

Diversity

Paid Parental Leave Amendment (More Support for Working Families) Bill 2023 has passed both Houses

The Paid Parental Leave Amendment (More Support for Working Families) Bill 2023 (Cth) passed both Houses without amendment on 18 March 2024.

Broadly, changes will:

- extend the Paid Parental Leave scheme by increasing parental leave pay entitlement to 26 weeks from 1 July 2026 as follows:
  - for children born/adopted on or after 1 July 2024: 22 weeks (110 flexible paid parental leave (PPL) days)
  - for children born/adopted on or after 1 July 2025: 24 weeks (120 flexible PPL days)
  - for children born/adopted on or after 1 July 2026: 26 weeks (130 flexible PPL days)

This change is intended to

> 'improve flexibility and access to the Paid Parental Leave scheme to better support the needs of working parents and carers'.

- increase the 'reserved period' for partnered claimants to four weeks from 1 July 2026 as follows:
  - for children born/adopted on or after 1 July 2024: 20 weeks (100 flexible paid parental leave (PPL) days)
  - for children born/adopted on or after 1 July 2025: 21 weeks (105 flexible PPL days)
  - for children born/adopted on or after 1 July 2026: 22 weeks (110 flexible PPL days)

This is intended to

> 'encourage fathers and partners to take a greater share of caring responsibilities by increasing the time that fathers and partners can take off work around the time of the child's birth or adoption'.

- increase the number of flexible paid parental leave days that can be taken concurrently by parents/carers to 20 days from 1 July 2026.

This measure is intended to

> 'assist parents to share caring responsibilities, and provide fathers and partners an opportunity to also provide care for birth parents to support their health, while ensuring parents are encouraged to return to work. Limits on the number of days that may be taken concurrently will prompt fathers and partners to take on independent care of the child, which international studies have demonstrated helps to develop patterns of care that persist throughout the child's life. The concurrency limit will also support and encourage families to share caring responsibilities more equally, which can in turn help improve women's workforce participation and close the gender pay gap, helping to address the "motherhood penalty".'

The reform is the second phase of the government's paid parental leave reforms and was announced as part of the government's October 2022-23 Budget.

[Source: Paid Parental Leave Amendment (More Support for Working Families) Bill 2023]

'Sexism in the City' report concludes workplace bullying/sexual harassment is still rife in financial services

What is the 'Sexism in the City' report? The House of Commons Treasury Committee report 'Sexism in the City' examined the barriers faced by women in financial services, including poor workplace cultures, unconscious bias, and the impact of maternity leave and childcare.

It also evaluated the progress made since the 2018 inquiry on Women in Finance, focusing on removing barriers to women entering and progressing their careers across the industry, the impact of the Treasury's Women in Finance Charter, removing gender pay gaps, and combatting sexual harassment and misogyny.

What was the headline conclusion? The report concluded that despite 'incremental improvements', many of the barriers identified in 2018 'remain stubbornly in place', with many firms continuing to treat DEI as a '"tick box" exercise rather than a core business priority, despite clear evidence that diverse firms achieve better results'.

The report also found that though 'sexual harassment against women is a societal problem, it is worse in financial services than in many other sectors'.

Some key recommendations

Strengthening the expectations set down in the Women in Finance Charter (Charter): The report recommends that the Charter should:

- Have a broader focus (in Treasury's Women in Finance Charter) on ensuring there is a pipeline of 'female talent to support long-lasting sustainable improvement in gender diversity in the sector'
- Strengthen the expectation that executive pay is linked to performance on diversity and inclusion (as opposed to merely setting the expectation that firms have an 'intent' to link pay to delivery on gender diversity targets)

Tighten gender pay gap reporting requirements: The report recommends that the government:

> 'strengthens the pay gap reporting regulations to incentivise firms to make faster progress. Specifically, we recommend it be made mandatory for firms with a pay or bonus gap above a certain threshold to publish a narrative explaining the drivers of the gap(s) and an action plan for how they will reduce them. We also recommend that the employer size threshold for pay gap reporting be reduced from 250 employees to 50 employees, at least for firms in financial services given the extent of the problem in this sector.'

The report also recommends that the government consider amending existing pay gap reporting guidance to include partners' remuneration and to set an expectation that more detailed information be reporting to 'provide more clarity around where pay gaps exist within firms and incentivise more targeted action to reduce them'.

Additional DEI reporting requirements should not be adopted: The report recommends that:

> 'the regulators drop their plans for extensive data reporting and target setting. In our view, a lack of diversity is a problem that the market itself should be able to solve without such extensive regulatory intervention.

Boards and senior leadership of firms should take greater responsibility for improving diversity and inclusion given that it should lead to a competitive advantage in the development of talent. Firms that perform best on diversity and inclusion and have the best cultures should be able to benefit from the clear business advantages this provides, leaving those that perform badly in these areas to suffer the consequences for their reduced competitiveness and profitability.'

'Equalise' parental leave arrangements: The report recommends that the government/regulators

> 'encourage all firms to consider equalising their offer of parental leave for men and women, and to actively encourage more men to take it up. We also recommend that the Government and regulators encourage firms to be transparent about their maternity and parental leave policies, including when advertising roles, by publishing them on their company websites'.

Whistleblowing processes should be strengthened: The report recommends that the government 'strengthen whistleblowing legislation to provide greater protection and support to whistleblowers in sexual harassment cases'.

Legislate a ban on the use of non-disclosure agreements in sexual harassment cases: The report found 'widespread misuse' of NDAs in sexual harassment cases. The report welcomes moves by the government to prevent this and recommends the introduction of legislation to 'ban the use of NDAs in harassment cases'. The report also recommends that the Financial Conduct Authority (FCA) undertake a data collection on the use of NDAs by regulated firms in cases of non-financial misconduct to provide a 'quantitative picture of the extent of their use in financial services in harassment cases, which could provide valuable evidence to support further action'.

Financial Conduct Authority response

Responding to the Report, the FCA welcomed the committee's feedback on its proposals to introduce new DEI disclosure requirements, and states that it will

> 'reflect on the range of views received, particularly those of the Committee, on our proposals that firms should set their own diversity and inclusion strategy and collect, report and disclose data against certain characteristics'.

The FCA also flags that this year it intends to

> 'prioritise proposals that tighten expectations on firms to tackle misconduct such as bullying and sexual harassment. We will also consider the Committee’s recommendations on whistleblowing and the use of non-disclosure agreements, building on our existing work.

[Sources: House of Commons Committee report: Sexism in the City; FCA media release 08/03/2024]

In Brief | Racial and Gender Pay 'scorecard' ranking the 128 largest US companies on pay transparency highlights a trend towards increased disclosure – over half (52%) of companies in the sample report some kind of quantitative pay gap disclosure (a near 12x increase on 2016)

[Sources: Arjuna Capital media release 11/03/2024; Full text report: Racial and gender equity scorecard 2023]

Shareholder Activism

2024 proxy season: AI and nature highlighted as emerging areas of focus across the 525 ESG shareholder proposals filed so far this year

As You Sow has published a review/analysis of 525 shareholder ESG proposals filed so far in 2024, highlighting continuing trends and emerging areas of focus.

Interestingly, despite the drop in support for shareholder ESG proposals in 2023 and the mounting anti-ESG backlash (eg Exxon's lawsuit against Follow This), the volume of proposals has not decreased markedly on last year – As You Sow tracked 536 proposals at the same time last year vs 525 this year.

Emerging trends

AI and nature/biodiversity are highlighted in the report among the emerging trends.

Nature: As You Sow highlights a new focus in shareholder environmental proposals this year on pushing companies to disclose specific types of climate-change impacts including the impacts of: deforestation; mining, water usage and pollution/packaging/waste.

As You Sow has also filed its first proposals (at PepsiCo and Kellanova) calling on the companies to conduct biodiversity dependence and impact assessments to identify the extent to which their supply chains are dependent on nature and vulnerable to biodiversity related risk.

AI-related proposals: The report groups the majority of proposals in this category into three subcategories. The largest of these (13 proposals) call on companies to report on the ethical guidelines they have in place when using AI in their business; the second largest subcategory calls for disclosure of misinformation risks; and the final subcategory calls for transparency around AI-related human rights impacts more generally. Notably, the report flags that shareholders are not only targeting large social media firms – proposals have been filed at Alphabet, Amazon, Apple, Comcast, Meta, Netflix, Paramount, UnitedHealth Group, Walt Disney and Warner Bros Discovery.

[Note: The proposal at Apple secured 38% support at the company's 2024 meeting (see: Governance News 07/03/2024 at p4)]

Continuing trends

Climate change: Despite the conservative backlash, the report found that climate change remains the single largest category of proposals in the sample accounting for 20% of proposals overall. As You Sow observes that the 'heavy focus on greenhouse gas emissions targets and reporting from last year remains'. Shareholders are also broadening their focus to include a range of other issues including: biodiversity loss, plastic pollution, vulnerabilities in agricultural supply chains.

Corporate political influence is the second largest category of shareholder proposal in the sample – accounting for 17% of proposals overall. As you Sow groups proposals in this category fall into three broad categories: election contributions, lobbying and 'values congruency' or 'inconsistencies between corporate policies and the viewpoints of politicians and groups who receive corporate money'. There are roughly even numbers of proposals in each of these categories.

Human rights is the third largest category of shareholder proposal in the sample – accounting for 14% of proposals overall.

Anti-ESG proposals: Despite persistently low levels of support – average 2.5% support - the volume of conservative/anti-ESG proposals continues to grow. According to the report, 8% of the total number of proposals filed fall into this category (though the report notes that the actual number is likely to be higher as these proposals are not shared with As You Sow ahead of being made public).

[Sources: As You Sow media release 14/03/2024; Proxy Preview 2024]

Follow This urges shareholders to back its Scope 3 proposal at Shell ahead of upcoming vote

Green activist Follow This has filed a Scope 3 shareholder proposal at Shell calling on the company to:

> 'align its medium-term emissions reduction targets covering the greenhouse gas (GHG) emissions of the use of its energy products (Scope 3) with the goal of the Paris Climate Agreement: to limit global warming to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C'.

The proposal has the backing (according to Follow This) of 27 institutional investors (managing more than € 3.9 trillion* in assets).

Following the release of Shell's latest strategy update, Follow This has reiterated its previous calls on shareholders to back its proposal, submitting that the company's decision to lower its emission reduction targets from 20% to 15-20% by 2030 and to abandon its emission reduction targets of 45% by 2035 is contrary to shareholder interests (and the interest of the planet). Follow This writes

> 'This backtracking removes any doubt about Shell's intentions: the company wants to stay in fossil fuels as long as possible. The board not only endangers the global economy by exacerbating the climate crisis, but also puts the company's future at risk through policy interventions, disruptive innovation, stranded assets, and accountability for the costs of climate change'.

Shell's 2024 shareholder meeting will be held on 21 May 2024.

Follow This has filed shareholder Scope 3 proposals calling on major oil companies (including Shell) to set Paris-aligned targets since 2016. In 2023, proposals at five oil majors went to a vote – the 2023 proposal at Shell secured 20% support (consistent with the result in 2022).

[Source: Follow This media release 14/03/2024]

Green Century claims credit for home improvement retailer's decision to disclose additional customer emissions information

Green Century says that a shareholder proposal (filed by Green Century) has prompted home improvement retailer Lowes to agree to increase disclosure of climate emissions data for the products it sells, including products with an 'outsize impact' on emissions eg lawncare equipment, home water heaters, and kitchen appliances.

Green Century considers the agreement to be significant as despite the fact that customer emissions account for the majority of the company's total emissions - up to an estimated 84% - Lowes has only provided minimal information to investors.

[Source: Green Century media release 14/03/2024]

SOC backs down on board change at Starbucks ahead of meeting

Starbucks shareholder (and labour union coalition) the Strategic Organizing Center (SOC) escalated pressure on Starbucks to shift its stance on worker welfare/labour rights this year by nominating three director candidates– Maria Echaveste (described as a 'former senior White House official and corporate attorney), Joshua Gotbaum (described as an experienced director of public and private companies) and Wilma Liebman (Chair of the National Labor Relations Board (NLRB) under the Obama administration) – to stand for election to the Starbucks board at the 13 March 2024 meeting.

Broadly, SOC submitted that board changes were required because (in its view):

> 'Starbucks' severe human capital mismanagement [ie opposition to/resistance to workers' attempts to unionise] has materially damaged the Company's reputation and exposed it to significant financial, legal and regulatory risk'.

For context, this followed a 52% vote in support of a 'freedom to unionise proposal' at the Starbucks 2023 shareholder meeting. For more read: Governance News 5 April 2023 at p8.

It also followed a year in which shareholder proposals dealing with various issues around worker rights/welfare including the right to unionise emerged as an area of increasing focus for shareholder advocacy groups and an issue that investors showed themselves increasingly willing to support.

> [Note: Analysis from Diligent Market Intelligence found that 'freedom of association proposals' were among the best performing ESG proposals of the 2023 season. Read: https://corpgov.law.harvard.edu/2023/11/30/which-esg-proposals-won-the-favor-of-investors/]

Ahead of the meeting, Starbucks advised shareholders to support its own slate of 11 board nominees – eight of whom are considered by Starbucks to have human capital management experience. Influential proxy advisers Institutional Shareholder Services (ISS) and Glass Lewis also recommended shareholders support Starbucks' slate of directors.

Last minute withdrawal: SOC withdrew its nominees ahead of the meeting citing announcements by Starbucks to address its concerns and progress achieved through talks with the company. For example, Starbucks agreed to:

> 'work together [with SOC] on a path forward to reach collective bargaining agreements for represented stores and partners, the resolution of litigation, and a fair process for workers to organise'.

SOC writes that dialogue with shareholders indicated that:

> 'by and large shareholders are optimistic the Company has committed to these changes in good faith and intends to begin to repair its relationship with its workers, which will ultimately enhance performance and shareholder value'.

At the meeting, all eleven Starbucks board nominees were elected with between 90% and 98% support.

Looking at how (some) investors voted:

- Norges Bank Investment Management (NBIM) voted in support of all eleven Starbucks board nominees
- California State Teachers Retirement System (CalSTRS) voted in support of three of eleven Starbucks board nominees
- California Public Employees Retirement System (CalPERS) voted in support of all eleven Starbucks board nominees
- NYC pension funds (New York City Board of Education Retirement System; New York City Employees' Retirement System; New York City Fire Pension Fund; New York City Police Pension Fund; and Teachers' Retirement System of the City of New York) voted in support of eight Starbucks board nominees.

Starbucks shareholders vote down all three shareholder proposals

Three shareholder proposals, all of which were opposed by the board, went to a vote at Starbucks' 13 March 2024 shareholder meeting. None secured the necessary support to be carried – each looks to have secured 5% or less shareholder support.

The table below provides a snapshot of each of the proposals, the result in each case and an indication of how some investors voted.

PROPOSAL	(APPROX) VOTE RESULT	HOW (SOME) INVESTORS VOTED
Proposal 4 in the Notice (filed by People for the Ethical Treatment of Animals (PETA)): **Request for report on plant-based milk pricing** The proposal calls on the company to 'report examining any costs to Starbucks' reputation and any impact on its projected sales incurred as a result of its ongoing upcharge on plant-based milk'.	5%	▪ Norges Bank Investment Management (NBIM) voted against ▪ California State Teachers Retirement System (CalSTRS) voted against ▪ California Public Employees Retirement System (CalPERS) voted against ▪ NYC pension funds (New York City Board of Education Retirement System; New York City Employees' Retirement System; New York City Fire Pension Fund; New York City Police Pension Fund; and Teachers' Retirement System of the City of New York) voted against
Proposal 5 in the Notice (filed by conservative group, the National Center for Public Policy Research): **Request for report on direct/systemic discrimination** The proposal calls on the company to 'conduct an audit and report to determine if and to what extent its programs and practices direct systemic discrimination against groups or types of employees, including "non-diverse" employees'.	1%	▪ NBIM voted against ▪ CalSTRS voted against ▪ CalPERS voted against ▪ NYC pension funds voted against
Proposal 6 in the Notice (filed by National Legal and Policy Center): **Request for report on human rights** The proposal call on the board to: 'issue a report by March 31, 2025…analysing the congruency of the Company's human rights policy positions with its actions, especially in countries in geopolitical conflicts or under oppressive regimes, as they impact how the Company maintains its reputation, viability and profitability'.	2%	▪ NBIM voted against ▪ CalSTRS voted against ▪ CalPERS voted against ▪ NYC pension funds voted against

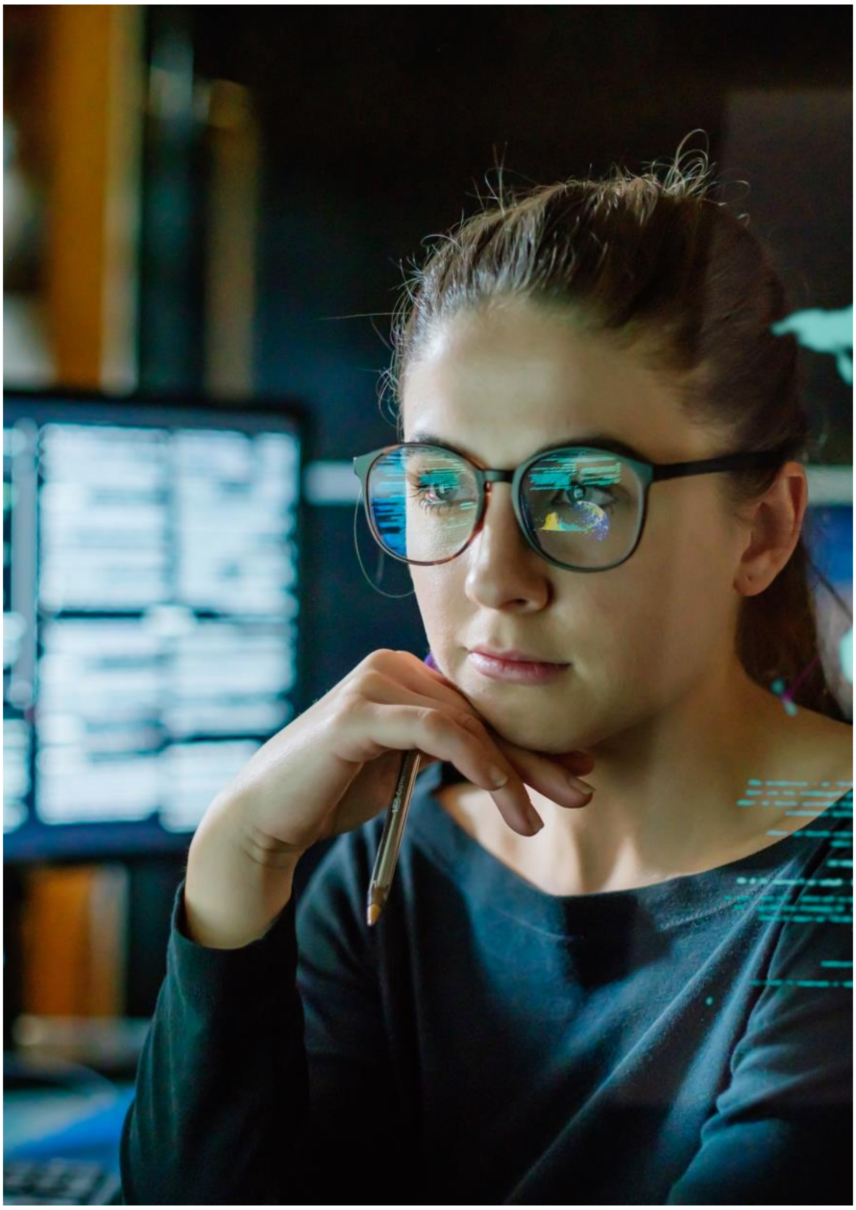
[Sources: Starbucks SEC Filings: SOC statement; Response to SOC; Starbucks notice of meeting; Results of meeting]

Disclosure and Reporting

Mandatory climate disclosure | ASIC issues update for SMEs, encourages SMEs to review greenwashing guidance before making sustainability claims

The Australian Securities and Investments Commission (ASIC) has released an update for small businesses on new (but as yet unlegislated) mandatory climate reporting requirements and greenwashing.

Here are our key takeaways.



Incoming (but as yet unlegislated) new mandatory climate reporting requirements – impact on SMEs

- For context, the Australian government is progressing plans to phase in a new, internationally aligned, mandatory climate disclosure reporting regime for heavy emitters, large listed companies, large private companies and superannuation funds/asset managers, with the release of draft legislation for consultation in January 2024. If enacted, the draft Bill would establish the framework for the proposed new disclosure regime. For more on the draft Bill see: Mandatory Climate Reporting in Australia | Draft Bill released for consultation - Technical update - MinterEllison. Consultation on the draft Bill closed on 9 February 2024 and as yet, the legislation has not been introduced into Parliament.
- **No direct impacts**: ASIC's update clarifies that the new requirements (as currently drafted) are not expected to apply (directly) to 'the majority of Australian small and medium businesses' as most SMEs will not meet the reporting threshold for Group 3 entities. For context, Group 3 entities would need to meet two of the following criteria:
  - consolidated revenue of $50 million or more,
  - consolidated gross assets of $25 million or more, and
  - employees numbering 100 or more.
- **SMEs may be indirectly impacted**: ASIC makes clear that while SMEs:

  'are not expected to have any direct reporting requirements in the immediate future…many small businesses **form part of the supply chain of larger businesses, which means they may need to engage with climate reporting considerations over time** [potentially from the second year of reporting when Scope 3 requirements start to apply], even if they do not have any direct climate reporting obligations'.

  [emphasis added]

- ASIC states that once the new laws come into effect it will work with SME representatives to develop guidance 'in relation to the requirements of the new laws and how the new laws may impact them'.

Greenwashing

ASIC reiterated that greenwashing is an enforcement priority.

The regulator encouraged SMEs to review ASIC's guidance in INFO 271 'if they intend to make sustainability-related claims in connection with the promotion or offering of financial products or services' as well as the ACCC guidance.

[Source: ASIC media release 19/03/2024]

Mandatory sustainability disclosure | Canada releases ISSB-aligned draft standards for consultation

Canada is following a number of other jurisdictions in moving to mandate ISSB-aligned sustainability disclosure requirements for 'publicly accountable enterprises', with the release by the Canadian Sustainability Standards Board (CSSB) of two draft Canadian Sustainability Disclosure Standards (CSDS) this week.

While aligned with IFRS S1 and S2, proposed [draft] CSDS 1 (which aligns with IFRS S1) and [draft] CSDS 2 (which aligns with IFRS S2) have been drafted with Canadian-specific modifications including Canadian-specific effective dates and transition 'relief proposals' to support implementation.

The official 'plain and simple overview' of the standards provides more detail around this.

Broadly, it's proposed that both standards would become voluntarily effective for annual reporting periods beginning on or after 1 January 2025 and mandatory for the reporting period beginning 1 January 2027.

The due date for submissions is 10 June 2024.

[Sources: CSSB media release 13/03/2024]

In Brief | SEC climate disclosure rule update: US Court grants Liberty Energy Inc. and Nomad Proppant Services' application for an 'administrative stay' on SEC's newly finalised climate disclosure rule

[Source: United States Court of Appeals for the Fifth Circuit, Liberty Energy v SEC No. 24-60109]

AI-washing enforcement action: SEC settles charges against two investment advisers who claimed to be using AI (when they were not)

Two investment advice firms have paid a total of $400,000 in civil penalties (without admitting or denying liability) to settle charges brought by the Securities and Exchange Commission (SEC) that they separately misled investors about their artificial intelligence (AI) usage. In each case, the firms claimed to be using AI to optimise their decision-making, when this was not the case.

SEC Chair Gary Gensler summed up SEC's concerns as follows:

> 'We find that [the firms] marketed to their clients and prospective clients that they were using AI in certain ways when, in fact, they were not…We've seen time and again that when new technologies come along, they can create buzz from investors as well as false claims by those purporting to use those new technologies. Investment advisers should not mislead the public by saying they are using an AI model when they are not. Such AI washing hurts investors.'

Director of the SEC's Division of Enforcement Gurbir S. Grewal underlined SEC's continuing focus on ensuring AI claims are not misleading:

> 'As more and more investors consider using AI tools in making their investment decisions or deciding to invest in companies claiming to harness its transformational power, we are committed to protecting them against those engaged in 'AI washing…As today's enforcement actions make clear to the investment industry – if you claim to use AI in your investment processes, you need to ensure that your representations are not false or misleading. And public issuers making claims about their AI adoption must also remain vigilant about similar misstatements that may be material to individuals' investing decisions.'

[Source: SEC media release 18/03/2024]

Institutional Investors and Stewardship

ICGN publishes a guide to engagement on AI for investors

International Corporate Governance Network (ICGN) has published new guidance to assist investors in assessing whether/to what extent companies are using artificial intelligence (AI) in a 'safe, ethical and sustainable manner' and to assist boards to assess 'the robustness of their AI oversight'/understand investor expectations/areas of concern in this context.

Investor expectations of AI oversight

The table below provides a brief snapshot of the expectations of boards highlighted in the paper.

INVESTOR EXPECTATIONS

Expectation of board oversight: A baseline expectation is that boards are able to explain to investors:

> 'the extent to which the company approaches AI as a risk or as an opportunity, and its short, medium, and long-term plans for integrating AI as part of its business model.'

Central to this is ensuring the board is 'properly equipped' to oversee AI-related risks/opportunities.

Responsible AI practices: Investors expect companies to

> 'implement AI in a way that preserves trust in the company and prevents, as far as reasonably possible, economic, human, social, and environmental harm'.

For example, investors expect companies to define the scope of AI applications used in human capital management.

Robust risk management processes: Investors expect boards to have strong risk management processes in place to

> 'identify assess and mitigate financially material AI-related risks, as well as potential adverse impacts on society and the environment'.

ICGN suggests these risks may include (among others): a) unwanted bias (which could lead to discriminatory outcomes/perpetuate inequalities in decision making); b) AI 'hallucinations' (where AI generates false information); c) spread of misinformation or harmful content through AI-generated content; d) failure to evaluate risks of using third-party tools; and e) intellectual property infringement.

Expectation that environmental impacts are also considered

ICGN writes:

> 'Regarding environmental risks, research shows that AI could support natural capital management through positive innovations. Identifying pollution, and mapping and measuring deforestation and the melting of icebergs are established examples. However, AI uses more energy than other forms of computing, raising concerns about its own ecological footprint. Training a single model uses more electricity than 100 homes consume in a year, and semiconductor production (which forms part of AI's underlying computational hardware) is highly polluting. These considerations **must be included in companies' decision-making'**.
>
> [emphasis added]

Expectation of transparency: Investors expect companies developing/training AI to be transparent around what data the model has been trained on and what data the AI systems they are using collect, use and store.

> 'company management should ensure that stakeholders, such as customers and employees, have consented to their data being used by AI. Moreover, all stakeholders should be made aware of their interactions with AI systems and companies should be transparent about any content that is AI-generated'

Investors also expect:

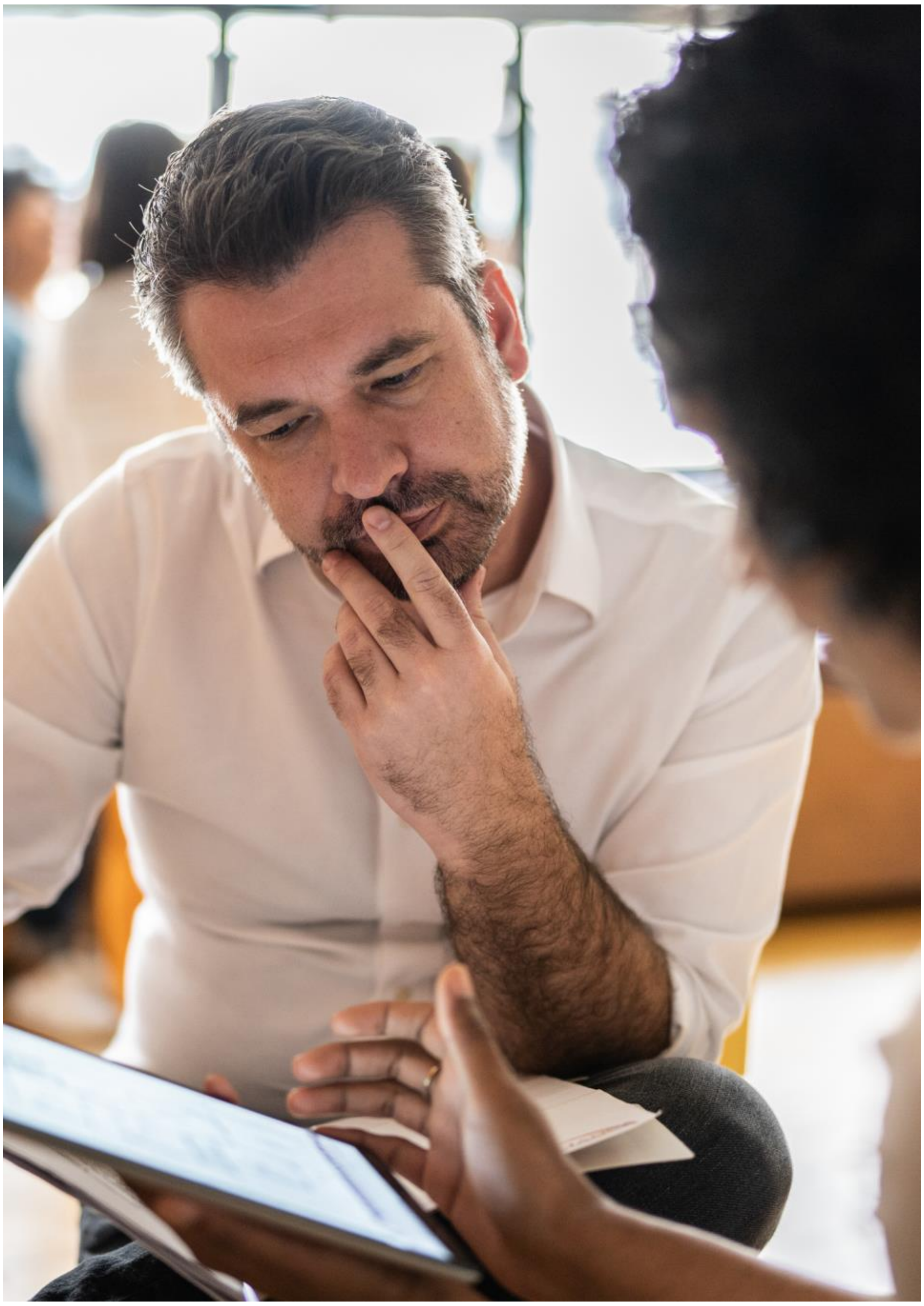
- Company management to be able to explain to their boards how AI systems they develop/use have been 'designed, trained, tested and scaled and how they align with human rights values and intent'.
- Timely disclosure of any material AI-related controversy.

INVESTOR EXPECTATIONS

Regulatory compliance: Boards are also expected to ensure that they stay abreast of emerging AI regulation and to ensure existing regulation/relevant standards (eg the OECD's AI Principles, UNESCO's Recommendation on the Ethics of AI, or ISO/IEC 421001:2023) are applied.

Questions for boards

The guidance also includes the following 10 suggested questions for boards:



- 'Has AI been considered in the development of the company's strategy? Does the company (or is it planning to) develop or use AI and, if so, how?
- How does the board ensure that it has sufficient knowledge and understanding of AI, if deemed relevant for the company?
- Did the company publicly articulate its approach to responsible AI? Is responsible AI embedded in relevant company policies (e.g. Code of Conduct, Data privacy)?
- Which risk management processes were established to identify material AI-related risks and mitigate these? What are the key AI related risks for the company, and how are they being mitigated? Who would be held responsible for AI controversies?
- Have any biases and privacy issues been identified?
- Has the board discussed how the AI systems the company uses or develops have been designed, trained, and tested?
- How does the company assess the implications of its use of AI on the workforce?
- Is management planning to reskill or upskill employees affected by automation, and, if so, how will success be measured?
- How does management conduct risk-based due diligence to identify, and prevent or mitigate adverse impacts of its use of AI on society and the environment?
- How regularly does the board engage with its stakeholders on AI, including employees? Did the company establish a grievance mechanism for AI-related matters?'

[Source: ICGN Investor Viewpoint – Artificial Intelligence: An Engagement Guide 05/03/2024]

ESG

Call for policy certainty on nature | ShareAction urges UK government to mandate TNFD disclosure

ShareAction has called on the UK government to provide urgently needed policy certainty on nature/biodiversity by acting to mandate disclosure against the Taskforce on Nature-related Financial Disclosures (TNFD) framework.

More particularly, ShareAction has urged the government to take the following three actions:

- **Enact legislation to mandate TNFD reporting by the end of 2027**. It's suggested that the government phase in the new requirements, starting with requiring 'core' disclosures from the largest organisations as a precursor to expanding the scope of disclosures and the companies required to report 'over the next few years'. Acknowledging the short timeframe, ShareAction considers the timing to be 'crucial' in light of the 'speed of action needed to address the rate of global biodiversity loss'.
- **Engage with financial institutions and regulators to develop guidance, incentives and penalties** to ensure effective implementation of the TNFD framework. ShareAction identifies lack of clarity around reporting expectations as a key barrier to companies embedding nature in the decision-making – providing clear guidance is therefore considered key. On incentives and penalties, ShareAction writes that:

  > 'Appropriate incentives and penalties are urgently required to avoid TNFD disclosures becoming a box-ticking exercise, as shown by the small number of companies disclosing against all 11 recommendations of the TCFD. Companies should recognise that active engagement with the framework is a necessity to address the nature crisis and that non-compliance has consequences. Furthermore, providing incentives for best practice will encourage best practice and increase ambition amongst organisations'.

- **'Enshrine due consideration of nature and biodiversity impacts in law, particularly concerning the financial sector'.** ShareAction writes:

  > 'The UK Government and financial sector should urgently recognise the threats that degradation of nature poses to current business models, and more importantly the irreparable damage to ecosystems resulting from investment in sectors, such as agriculture, forestry, and mining, which significantly impact local biodiversity. The financial sector has a pivotal role to play in addressing biodiversity loss, but ambitious legislation needs to lead the way. There has been marginal improvement as nature moves up the global agenda, and asset managers appear much more receptive to including nature within their financial decision making. However, these same asset managers have repeatedly cited lack of legislation and capacity as limiting factors to progress. In order to meet the targets of the GBF, and the UK's own legally binding environmental targets, nature protection policy needs to be scaled-up effectively and ambitiously'.

  [Source: ShareAction paper: Policy to Preservation: Why the UK Government should introduce mandatory reporting against the TNFD 18/03/2024]

NZBA updates guidelines to bring banks' capital markets activities within scope of the targets

Members of the UN-convened Net-Zero Banking Alliance (NZBA) have voted to adopt updated Guidelines for Climate Target Setting for Banks.

The underlying goals in the guidelines are unchanged. Broadly, banks still commit to reaching net zero by 2050 or sooner and to setting intermediate 2030 sectoral targets in line with the latest science using low or no overshoot 1.5°C scenarios and covering all or a substantial majority of nine carbon-intensive sectors.

Key change: The guidelines have been updated (among other things) to bring banks' capital markets activities within scope of the targets set.

Specifically, the updated guidance states that:

> 'Targets shall cover lending activities and capital markets arranging and underwriting activities (both equity and debt), as explained below, and should cover investment activities. Banks should be clear about which parts of the balance sheet the targets encompass and may set separate targets for different asset classes.'

In terms of timing, banks are expected to have reviewed existing targets to include capital markets activities by **1 November 2025** and include capital markets activities in any new targets set after **1 November 2025**.

NZBA highlights this as significant because:

> 'For some banks, capital markets arranging and underwriting services provided to clients in the issuance of new debt and equity instruments are their largest source of attributable greenhouse gas emissions'.
>
> [Source: NZBA media release 13/03/2024]

Bank of England urged to reprioritise climate

In an open letter, the Positive Money coalition has urged Bank of England Governor Andrew Bailey to:

> 're-prioritise work to align the financial sector with the government's climate goals, reverse resource cuts [within the bank] for this work, and reassert the Bank of England as a climate leader as a matter of urgency'.

It's submitted that climate/nature-related risks pose a risk to the UK's economic stability.

> 'Despite climate-related financial-risk disclosure initiatives now being widespread, the UK financial sector continues to under price climate risks, and finance emissions and nature-destruction at a pace and scale that posits a risk to global financial and monetary stability, as well as global climate goals'.

The letter asserts that as climate and nature remain with the bank's 'core mandate for financial stability' and that these issues remain part of the government's broader policy objectives there is no justification (resourcing cuts notwithstanding) for deprioritising these issues.

The letter follows a separate call in January 2024 from a coalition of 21 investors calling for increased disclosure of bank-specific results of climate stress tests to ensure shareholders/creditors have a clear picture of the potential climate risks 'embedded in bank balance sheets'.

> [Source: Positive money media release 18/03/2024; Full text letter]

In Brief | Edging closer: EU member states have reached agreement to progress a compromise version of the CSDDD which would establish a corporate due diligence duty, mandating operational/supply chain oversight for in-scope entities

> [Sources: Final text endorsed in COREPER on 15 March 2024; European Council media release 14/03/2023]

Markets and Exchanges

ASX opens consultation on proposed CHESS replacement solution implementation plan

On 14 March 2024, ASX released a consultation paper outlining its planned two stage approach to implementing a CHESS replacement solution and calling for feedback on key aspects of the proposed first stage (called Release 1) including the scope, time required to implement and testing approach for Release 1.

For context, CHESS (the Clearing House Electronic Subregister System) is the system used to effect the settlement of securities traded on the ASX.

Broadly, ASX proposes that

- Release 1 would:

  > 'replace CHESS' clearing component and introduce Financial Information eXchange (FIX) messaging for trade registration for all Approved Market Operators (AMOs)'.

ASX underlines that:

> 'Under the proposal (for Release 1), CS Participants and other CHESS Users are expected to experience minimal disruption, as all existing external message workflows (i.e. EIS messages) generated by the new clearing service will be fully backwards compatible. The only change will be the new FIX 5.0 AMO message interface used by AMOs'

- It's proposed that Release 2:

  > 'will enhance settlement and subregister functionality and messaging interfaces for participants, registries and payment providers'.

The details of the proposed implementation approach for Release 2 are planned to be consulted on in a second round of consultation later in the year.

Proposed 'go live' date?

ASX states that it is 'targeting the implementation of Release 1 in Q1 2026'.

Sections 4 and 5 of the consultation paper include more information about the proposed timeline for industry testing and the criteria for go-live readiness.

Next steps

- The due date for submissions is 24 April 2024.
- ASX expects to publish its response to the consultation and outline next steps towards implementation of Release 1 by the end of June 2024.
- ASX expects to release the second consultation paper (on Release 2) in Q3 2024, with a view to publishing a response in 'late Q4 2024'.

  [Source: ASX consultation: Consultation Paper on Staged Implementation Approach and Implementation of Release 1 (Clearing Services)]

Financial Services

Top Story | FAR implementation: Regulators release cross industry guidance, set expectations around FAR preparation for the insurance and super sectors

Here's what's in ASIC and APRA's joint FAR 'information package

Key Takeouts

- For context, the Financial Accountability Regime Bill 2023 and the Financial Accountability Regime (Consequential Amendments) Bill 2023 passed both Houses on 5 September 2023 and received Assent on 14 September 2023. The FAR which replaces and expands on the existing BEAR will apply to the banking sector from March 2024 and the insurance and superannuation sectors from March 2025. For more on the FAR read: FAR status update: FAR Bills now law
- **Minister Rules:** Following consultation, the Financial Accountability Regime (Minister) Rules 2024 (Rules) have been released in final form. Importantly, these Rules both: a) prescribe the responsibilities and positions 'which cause an individual to be an accountable person of an accountable entity' and b) prescribe when an accountable entity meets the 'enhanced notification threshold'. Read: FAR implementation | Financial Accountability Regime (Minister Rules) 2024 published - POST - MinterEllison
- **Regulator and Transitional Rules:** Separately, ASIC and APRA (which will jointly administer the FAR) have also released:
  - Financial Accountability Regime Act (Information for register) Regulator Rules 2024 (Regulator rules) which 'prescribe information for inclusion in the FAR register of accountable persons'
  - Financial Accountability Regime (Consequential Amendments) Transitional Rules 2024 (Transitional rules) which 'prescribe information to be provided by authorised deposit-taking institutions (ADIs) in relation to their existing accountable persons under the BEAR at the transition point to the FAR'

  For more on the Regulator and Transitional Rules read: FAR transition | Regulators issue final Rules - Insight - MinterEllison
- **New cross-industry guidance to support FAR implementation**: RG 279 is intended to support entities and their accountable persons in understanding and complying with their FAR obligations together with updated accountability statement guidance/template
- **FAR implementation for the insurance and super sectors**:
  - ASIC and APRA have released a joint letter outlining the steps the regulators expect insurers and superannuation entities to take ahead of FAR's commencement
  - ASIC and APRA are consulting on a proposed draft instrument that includes a proposed list of key functions for insurers and RSE licensees and a separate document describing each of these proposed functions. The due date for submissions is **19 April 2024**.

New cross industry guidance on FAR implementation released

On 14 March 2024, the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA) (the regulators) released new cross-industry guidance - RG 279 Financial Accountability Regime: Information for accountable entities - to support accountable entities (AEs) and their accountable persons (APs) to understand and comply with their FAR obligations.

Some points to note

Guidance on the completion of accountability statements and accountability maps: 'Enhanced entities' will need to submit an accountability statement for each of its APs and an accountability map showing lines of reporting and responsibility within the entity (or their relevant group).

RG 279 offers the following guidance on completing accountability statements:

> 'Accountability statements must reflect actual accountability as it operates in practice within the accountable entity and its relevant group. Accountability statements should be specific to both the accountable entity and the individual accountable person. The Regulators expect the content of the accountability statement of an accountable person would align with the accountable person's allocated key function(s). However, the

> Regulators do not expect that the allocation of any key function(s) to an accountable person would, in itself, materially shape the content or structure of the accountability statement of the accountable person. The Regulators expect individuals nominated as accountable persons to be closely involved in the development of their own accountability statement. These individuals should have read, understood and accepted the areas of accountability as drafted, as well as the accountability obligations of an accountable person under the FAR Act. Individual accountable persons must sign their accountability statement declaring that the content inaccurate and they understand their accountability obligations'.

Further detail around the regulator's expectations of the minimum content to be included and a 'suggested template' has also been released in a separate document see: Financial Accountability Regime: Accountability statement guidance and template | APRA

RG 279 offers the following guidance on completing accountability maps:

> 'The Regulators have not provided a suggested template for an accountability map. Accountable entities are encouraged to consider constructing their map in a way that will best help them clarify their organisational structure and chart where ultimate accountability for their various businesses and functions lies across the accountable entity or its relevant group. In particular, the Regulators expect an accountability map would include reporting lines to and from each accountable person. To promote consistency and readability, the Regulators also expect the language used in an accountability map to align with that in accountability statements.'

The regulators also flag that they:

> 'are taking a principles-based approach to administering obligations about the content of statements and maps, and will periodically assess whether additional content needs to be prescribed in the Regulator rules.

Identifying Significant Related Entities (SREs): RG 279 makes clear that when undertaking the task of identifying their SREs AEs are expected to: 'consider both financial and non-financial risk factors when assessing whether an entity is an SRE'. RG 279 states that these risk factors should include:

- 'the nature and scale of the entity's business or activities;
- the nature and extent of any interdependency between the entity and the accountable entity; and
- any organisational, financial or administrative arrangements, including any material business activity, between the entity and the accountable entity'.

It's observed that:

> 'Paragraph 1.36 of the Explanatory Memorandum describes the relationship between an accountable entity and its SRE in a similar way to how APRA defines 'material business activity' in Prudential Standard CPS 231 Outsourcing (CPS 231), Prudential Standard HPS 231 Outsourcing (HPS 231) and Prudential Standard SPS 231 Outsourcing (SPS 231)'.

In addition, AEs are expected to:

> 'consider whether the business activities of the related entity could have a substantial impact on their customers, operations, brand, reputation, legal and regulatory compliance, and people, regardless of the size of the related entity. The Regulators expect an accountable entity to put in place robust methodologies and procedures to assess which of their subsidiaries or connected entities are SREs. Such methodologies and procedures should align and integrate with the accountable entity's broader risk management framework'.

Guidance on deferred remuneration obligations under the FAR (and the interaction between FAR and CPS 511):

Appendix B to RG 279 provides a comparison of the deferred remuneration obligations under the FAR vs the obligations under CPS 511. The regulators' comment:

> 'While the two regimes broadly align, Appendix 2 [called Appendix B in RG 279] outlines certain nuances that accountable entities should be aware of during implementation'.

A key difference highlighted by the regulators is that CPS 511 deferred requirements do not apply to non-SFIs whereas under the FAR variable remuneration deferral obligations apply to accountable entities regardless of size.

Another difference highlighted concerns the percentage of variable remuneration required to be deferred. Under the FAR an accountable entities must defer 40% of the variable remuneration of all APs for a minimum of four years (with no pro rata vesting permitted).

Under CPS 511 deferral requirements are 'more stringent' for CEOs – under CPS 511, 60% of CEOs variable remuneration must be deferred for a minimum of six years (with pro rata vesting permitted after four years).

RG 279 states that:

> 'accountable entities that are SFIs will in most cases satisfy the FAR deferred remuneration obligations when complying with the CPS 511 deferral requirements. That is because the CPS 511 deferral requirements are generally more prescriptive than the deferred remuneration obligations under the FAR'.

Preparing for FAR commencement: Regulators outline their expectations of the super and insurance sectors

APRA and ASIC have set the expectation that insurers and superannuation funds undertake the following actions ahead of the 15 March 2025 (when the FAR will apply to these sectors).

- Review the FAR implementation guidance in Financial Accountability Regime: Information for accountable entities (RG 279)
- Determine whether they are an 'enhanced' or 'core' accountable entity based on the enhanced notification thresholds in the Financial Accountability Regime (Minister) Rules 2024 (see: FAR implementation | Financial Accountability Regime (Minister Rules) 2024 published - POST - MinterEllison) and identify their significant related entities (SREs) (guidance on this is included at para 2.1 of RG 279)
- 'Undertake accountability mapping to support compliance with relevant key personnel obligations' (guidance on this is included at para 2.4 of RG 279)
- 'Identify their accountable persons, and accountable persons of their SREs' (guidance on this is included at para 3.2 of RG 279)
- 'Put in place processes to ensure they comply with their notification obligations' (guidance on this is included in Chapter 4 of RG 279)
- 'For entities that are part of a corporate group, determine the impact of the FAR on other entities within the group' (including any SREs)' (guidance on this is included in Chapter 4.2 and 4.2.4 of RG 279)
- 'Assess and strengthen their remuneration policies to comply with the deferred remuneration obligations under the FAR' (guidance on this is included in Chapter 5 of RG 279)
- 'Participate in' the consultation on the draft Financial Accountability Regime Regulator Rules Amendment Instrument No. 1 of 2024 which includes a proposed list of Insurance Key Functions and RSE licensee Key Functions and the separate descriptions of each. (More on the consultation below).

ASIC and APRA also expect enhanced insurance and superannuation entities to:

- Review the following accountable statement guidance and template: Financial Accountability Regime: Accountability statement guidance and template | APRA
- Prepare their accountability maps and accountability statements (guidance on this is included at 4.2.2 and 4.2.3 of RG 279)

Consultation on proposed 'key functions' and key function descriptions for insurance and superannuation entities

The Regulators are required to establish and keep a register of Accountable Persons under the FAR. The Financial Accountability Regime Act (Information for register) Regulator Rules 2024 (Regulator Rules) prescribe the information for inclusion in this register – including 'key functions' information. The current version of the Regulator Rules only prescribe 'ADI Key Functions'. Read: FAR transition | Regulators issue final Rules - Insight - MinterEllison

Ahead of the FAR commencement date (15 March 2025) for the super and insurance sectors, the Regulators are consulting on a draft instrument - - Draft Financial Accountability Regime Regulator Rules Amendment Instrument No. 1 of 2024 – setting out a proposed list of Insurance and RSE licensee Key Functions together with a separate document describing each the proposed Key Functions.

Proposed Insurance Key Functions: For each AP, the accountable entity is proposed to be required to report to the regulators whether each of their APs has 'actual or effective senior executive responsibility for management or control of the whole of, or a significant or substantial part or aspect of' any of the following 'key functions' (to enable this information to be included in the FAR Register):

'(a) capital management;

(b) collections and enforcement (default, debt collections and recovery);

(c) conduct risk management;

(d) data management;

(e) financial and regulatory reporting;

(f) hardship processes;

(g) insurance risk management;

(h) operational risk management;

(i) product design and distribution obligations;

(j) product origination;

(k) recovery and exit planning and resolution planning;

(l) reinsurance management;

(m) scam management;

(n) technology management;

(o) training and monitoring of relevant representatives and staff;

(p) underwriting; and

(q) whistleblower policy and process'.

Proposed RSE Key Functions: For each AP, the accountable entity is proposed to be required to report to the regulators whether the AP has 'actual or effective senior executive responsibility for management or control of the whole of, or a significant or substantial part or aspect of' any of the following 'key functions' (so that the information can be included in the FAR register).

'(a) conduct risk management;

(b) data management;

(c) financial and regulatory reporting;

(d) hardship processes;

(e) investment management;

(f) liquidity management;

(g) marketing and advertising;

(h) member outcomes;

(i) operational risk management;

(j) product design and distribution obligations;

(k) product origination;

(l) recovery and exit planning and resolution planning;

(m) scam management;

(n) technology management;

(o) training and monitoring of relevant representatives and staff; and

(p) whistleblower policy and process'.

Timing: The due date for submissions to the consultation is **19 April 2024**. The regulators expect to finalise the instrument in 'quarter 2 of 2024'.

Planned engagement with insurers and RSE licensees

The Regulators plan to 'engage with and support' entities in the lead up to FAR commencement.

The Regulators plan to send webinar invitations 'shortly' to give entities an opportunity to ask questions about the information package in April, dates below.

- Tuesday, 9 April for superannuation entities
- Wednesday, 10 April for general and life insurance entities
- Thursday, 11 April for private health insurers

The Regulators flag that they

> 'will also consider conducting targeted activities to support the effective implementation of the FAR. The Regulators intend to adopt a risk-based, proportionate approach to implementation and will communicate further detail in due course'.

> [Sources: ASIC media release 14/03/2024; Joint consultation on the proposed amendments to the Regulator rules and draft key functions descriptions for insurance and superannuation entities; FAR joint guidance materials]

Top Story | 'Reasonable' rehashed: Judicial clarity on a licensee's obligation to take 'reasonable steps'

The Federal Court's decision in Australian Securities and Investments Commission v R M Capital Pty Ltd [2024] FCA 151 is the first case to consider the proper construction of the obligation under 963F of the Corporations Act 2001 (Cth) (the Act) for Australian Financial Services licensees to 'take reasonable steps to ensure that representatives of the licensee do not accept conflicted remuneration'.

You can find MinterEllison's reflections on the implications here: 'Reasonable' rehashed: Judicial clarity on a licensee's obligation to take 'reasonable steps' - Insight - MinterEllison

Status update: Bill proposes to legislate an 'objective' for superannuation

The Superannuation (Objective) Bill 2023 (Cth) was introduced into the House of Representatives on 16 November 2023.

The Bill proposes to legislate the following 'objective' for superannuation:

> 'The objective of superannuation is to preserve savings to deliver income for a dignified retirement, alongside government support, in an equitable and sustainable way (the objective)'.

The policy intent of the Bill is to:

> 'require policy-makers to demonstrate to the Parliament, and Australians, how future changes to superannuation law are consistent with the legislated objective'.

The explanatory memorandum emphasises that this is not intended to:

> 'change the operation or interpretation of existing superannuation law, prudential standards or governing rules of superannuation entities. For example, it will not change or prevent how members can currently access their superannuation such as the payment of a lump sum on retirement or early access to their superannuation in exceptional circumstances'.

Outlook: The Bill has been referred to the Senate Economics Legislation Committee for report by 28 March 2024. The Bill has progressed to third reading stage in the House of Representatives and is still to pass the Senate.

If the Bill were enacted in its current form, the changes would commence 28 days after Assent is given.

> [Source: Superannuation (Objective) Bill 2023 (Cth)]

ASIC welcomes 'high level of compliance' with new IDR reporting requirements

The Australian Securities and Investments Commission (ASIC) has issued an update on compliance by financial firms with internal dispute resolution (IDR) reporting requirements.

ASIC says that of the 8600 financial firms due to report their IDR data to the regulator for the first time, 87% did so by the 14 March 2024 deadline.

Commenting on this, ASIC states:

> 'The high level of compliance with this new requirement is encouraging. Firms are reminded of the need to meet this reporting requirement twice per year. ASIC will continue to engage with firms on meeting this requirement'.

ASIC has flagged that analysis of the data provided will inform its approach to publication. ASIC has said it will communicate this approach in advance of publication.

[Source: ASIC media release 15/03/2024]

APRA urges insurers to 'think seriously' about how they can improve communication with consumers (especially around the actions consumers could take to help mitigate their risks and reduce their insurance premiums)

Here are our key takeaways from Australian Prudential Regulation Authority (APRA) Executive Director of Insurance Sean Carmody's 18 March 2024 speech to Future of Insurance 2024 conference.

Current state of the insurance industry: Mr Carmody said that Australia's insurance industry remains both 'financially strong and well-capitalised' and that 'policyholders can have confidence that their insurer will have the financial capacity to pay all valid claims in their time of need'. Mr Carmody noted that insurers are undertaking a number of actions which APRA considers will 'strengthen the industry's management of operational risk, improve business continuity planning and the management of risks arising from the use of service providers'. This work includes (among other things) addressing 'gaps in cyber controls' and progressing preparations for compliance with CPS 230 (which will apply from July 2025).

Challenges facing the sector: Mr Carmody observed that increasingly frequent extreme weather events, cost of living pressures and increasing levels of hardship across mortgage borrowers are contributing to accessibility and affordability challenges for consumers – that the 'protection gap' is widening'. In addition, Mr Carmody said that the industry is under increased 'scrutiny' eg through the House of Representatives Standing Committee inquiry into industry's response to the 2022 floods.

Reducing underlying risk: Mr Carmody noted that collective action is already being undertaken by industry, various levels of government, industry bodies and policyholders towards developing 'system wide' solutions to some of these issues. Mr Carmody submitted that there are also additional steps insurers 'can take themselves to help confront' certain challenges facing the industry.

Clearer/more transparent/open communication with customers: Mr Carmody said there is scope for insurers to improve their communication with customers (and build trust) by ensuring that:

> 'customers clearly understand their risks, as well as the products and choices that are available to them to balance cost and protection and whether there is anything they can do themselves to help mitigate their risks and reduce their insurance premiums'.

On this last point, Mr Carmody added:

> 'I encourage all insurers to think seriously about how their processes and communication could make it clearer to their customers what they can do to make their home, car or health more resilient and to what extent that could have an impact on their premium'.

The role of 'product innovation' in helping to narrow the protection gap: Mr Carmody also suggested that product innovation 'has the potential to help address the protection gap and is another area that could benefit greatly from transparency'. Mr Carmody called on insurers to:

- 'design products and services that are of demonstrable value to the community;
- ensure these products reach the most suitable target market: be clear who the products is designed for;
- simplify your products and processes and review them regularly to adjust to changing consumer needs;
- use plain English product disclosures and don't hide the devil in the detail;
- be fair and clear in your pricing, ensuring it aligns with good product features; and
- ensure you have a clear, open, empathetic, fair and speedy claims process'.

[Source: Keynote speech by APRA Executive Director of Insurance Sean Carmody at the Future of Insurance conference 18/03/2024]

Risk Management

Top Story | Release of the Final Report of the Aged Care Taskforce

The Aged Care Taskforce has released its Final Report, delivering 23 recommendations to support an equitable, financially sound and sustainable sector.

You can find MinterEllison's high level overview here: Release of the Final Report of the Aged Care Taskforce - Insight - MinterEllison

Tackling online scams | National Anti-Scam Centre says losses to scams fell significantly in Q4 2023, Assistant Treasurer says 'scammer crackdown' is working

The National Anti-Scam Centre (NASC) has released a report summarising some key outcomes achieved during Q4 2023.

The headline message is that there have 'significant' falls in scam losses since NASC has been in operation – for example, NASC writes that there has been a 43% decrease on Q4 2022 and a 26% decrease Q3 2023.

Drilling down, comparing the Q4 data with Q4 2022, NASC writes that there has been a

- 38% decrease in investment scam losses to $52.4 million
- 74% decrease in losses by cryptocurrency to $12.4 million
- 31% decrease in losses by bank transfer to $40.2 million
- 22% decrease in losses where social networking is the contact method to $15.9 million.

In a statement welcoming the release of the report, Assistant Treasurer and Minister for Financial Services Stephen Jones commented:

> 'Within six months the trend that saw scam losses double year-on-year has completely flipped – people's money is safer because the government is fighting back…While this report is a promising sign that our plan is working, we urge people to remain vigilant to scammers and keep up to date with advice from the ACCC to protect themselves.'

[Sources: NASC media release 12/03/2024; Assistant Treasurer and Minister for Financial Services Stephen Jones media release 12/03/2024]

In Brief | Responsible use of AI: European Parliament approves legislation to regulate AI use across the EU

[Sources: Artificial Intelligence Act: adopted text; European Commission information page: AI Act]

Status update | Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 receives Assent

The Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 (Cth) passed both Houses on 29 February 2024 and received Assent on 8 March 2024.

The reforms in the Bill are intended to 'further strengthen Australia's implementation and enforcement of the Anti-Bribery Convention by strengthening the legal framework for investigating and prosecuting foreign bribery' and 'overcome the limitations of the current foreign bribery offence which has proven to be overly prescriptive and difficult to use'.

Key changes

Introduce a new 'failure to prevent' offence

The Bill includes a new indictable corporate offence of failing to prevent foreign bribery.

The explanatory memorandum explains that this offence, modelled on a similar UK provision, will apply where:

> 'an associate of a body corporate has committed bribery for the profit or gain of the body corporate. It will be a defence if the body corporate can establish that it had 'adequate procedures' in place to prevent the commission of foreign bribery by its associates'.

This new offence has been introduced with the aim of:

> 'overcom[ing] challenges in establishing criminal liability of businesses that engage in wilful blindness with respect to misconduct by their employees and other associates, and is intended to incentivise businesses to implement and maintain adequate procedures to prevent foreign bribery from occurring. The offence will be an incentive for companies to implement and maintain measures to prevent bribery'.

Changes to the existing foreign bribery offence

The Bill also includes changes to:

- expand the foreign bribery offence to include:
  - 'the bribery of candidates for public office (not just current holders of public office); and
  - bribery conducted to obtain a personal advantage (the current offence is restricted to bribery conducted to obtain or retain a business advantage)'
- remove the existing requirements that:
  - 'the benefit or business advantage be 'not legitimately due' and replaces it with the concept of 'improperly influencing' a foreign public official; and
  - the foreign public official be influenced in the exercise of their official duties'.

The changes in the Bill also clarify that:

> 'the foreign bribery offence does not require the prosecution to prove that the accused had a specific business, or business or personal advantage, in mind, and that the business, or business or personal advantage, can be obtained for someone else'.

Timing

The bulk of the changes will commence in September 2024 (six months after Assent)

[Source: Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023]

Other News

Replacement of the AAT with new Administrative Review Tribunal: Status update on the three Bills

Two Bills - Administrative Review Tribunal Bill 2023 (Cth) and Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth) – were introduced into the House of Representatives on 7 December 2023.

The Senate Standing Committee for the Scrutiny of Bills has raised several concerns about various aspects of the Bills.

A third Bill - Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) Bill 2024 - was introduced into the House of Representatives on 7 February 2024.

All three Bills have been referred to the Senate Legal and Constitutional Affairs Committee for report by 24 July 2024.

The Bills have progressed to second reading stage in the House of Representatives (and have yet to pass either House).

Key Points

- Broadly, the Bills would abolish the existing Administrative Appeals Tribunal and replace it with a new Administrative Review Tribunal.
- The primary Bill - Administrative Review Tribunal Bill 2023 (Cth) - would establish a new Administrative Review Tribunal and the Administrative Review Council.

- The Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023 (Cth) would repeal the Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act), make consequential amendments to 138 Commonwealth Acts and facilitate the smooth transition from the AAT to the Tribunal.
- The Administrative Review Tribunal (Consequential and Transitional Provisions No.2) Bill 2023 (Cth) would make consequential amendments to 110 Commonwealth Acts that interact with the AAT Act, to

> 'to ensure continuity for the tribunal and its users. Decisions under these acts collectively amount to approximately seven per cent of the AAT's jurisdiction by caseload'.

Proposed timing: The Primary Bill would commence on a day to be fixed by Proclamation. Or, if the provisions do not commence within 12 months of Assent being given, on the first day of the first calendar month to start after the end of 12 months after Assent.

[Source: Administrative Review Tribunal Bill 2023 (Cth), Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023 (Cth)]

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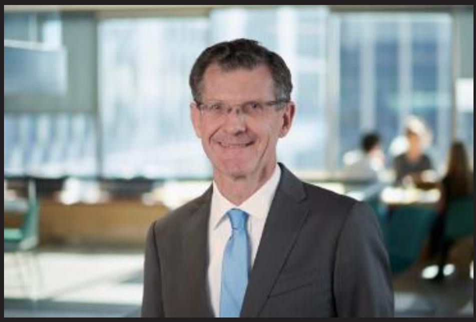

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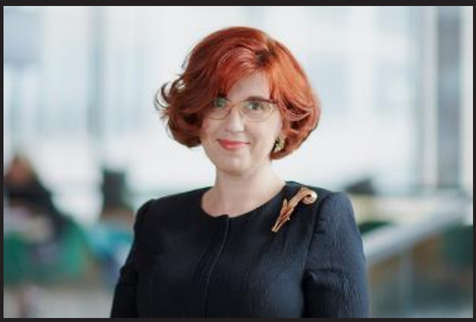

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